UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRONTLINE SECURITY SERVICES, LLC Employer, and INTERNATIONAL UNION, SECURITY POLICE AND FIRE PROFESSIONALS OF AMERICA Petitioner, INDUSTRIAL, TECHNICAL & PROFESSIONAL EMPLOYEES UNION, OPEIU LOCAL 4873, AFL-CIO Proposed Intervenor.	)	Case No. 10-RC-147443

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS *AMICUS CURIAE*

Interest of the Amicus Curiae

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) files this brief as *amicus curiae*. The AFL-CIO is composed of 56 national and international unions representing over 12 million workers. As an organization whose affiliated national and international unions and their locals are all "mixed unions" the AFL-CIO has a vital interest in this case.

Introduction

In *University of Chicago*, 272 NLRB 873 (1984), the Board overruled precedent[1] and disturbed established practice to hold that Section 9(b)(3)[2] of the National Labor Relations Act, as amended in 1947, prohibits unions representing both guards and non-guards (hereinafter "mixed unions") from appearing on the ballot in Board-conducted elections in a unit of guards, even though existing precedent had fully honored the prohibition in Section 9(b)(3) against certifying such a union as the representative of guards by providing for certification of the arithmetic results of such elections when the mixed union received a majority of the votes. The AFL-CIO urges the Board to overturn *University of Chicago* because it ignores the plain language of Section 9(b)(3), betrays the legislative compromise agreed to in Congress, does not protect employers' interests, and diminishes employees' core Section 7 rights.

I. The Plain Language of Section 9(b)(3) Unambiguously Identifies a Bar Against Board Certification as the Representative of Guards as the Only Disability Congress Intended to Impose on Mixed Unions.

Congress enacted Section 9(b)(3) in response to *NLRB v. Jones & Laughlin Steep Corp.*, 331 U.S. 416 (1947), wherein the Court upheld certification of a mixed union as the bargaining representative of a unit of guards. Section 9(b)(3)'s restrictions were intended to insure guards' undivided loyalty when they are called upon to enforce employer rules against fellow union

[1] *Bally's Park Place, Inc.*, 257 NLRB 777 (1981); *Williams J. Burns Int'l Detective Agency, Inc.*, 138 NLRB 449 (1962). *See also Rock-Hill-Uris, Inc. v. McLeod*, 236 F.Supp. 395 (S.D.N.Y. 1964).

[2] Section 9(b)(3), in relevant part, states "that the Board shall not . . . (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

members. But Congress sought to accomplish that broad purpose through highly specific and unambiguous language that is inconsistent with the rule adopted in *University of Chicago*.

The restrictions Congress imposed on the Board in Section 9(b)(3) are set forth in two parts. The first part states that the Board shall not "decide that any unit is appropriate for [collective bargaining] if it includes, together with other employees, any individual employed as a guard." The second part states that "no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards." Part two is directly relevant here and does not support the holding in *University of Chicago*.

Congress imposed only one, very specific restriction on the Board in relation to mixed unions. Congress provided only that no mixed union "shall be certified" as the representative of a unit of guards. Indeed, previously, "The Board has been at pains to point out that Section 9(b)(3) proscribes *only* the certification of affiliated labor organizations as representing guard units." *White Superior Division, White Motor Corp*., 162 NLRB 1496, 1499 (1967) (emphasis added). "That is all it does and was designed to do." *University of Chicago*, 272 NLRB at 877 (Member Zimmerman, dissenting).

The Supreme Court's construction of former Sections 9(f), (g), and (h) of the Act, also added by the 1947 Taft-Hartley amendments, is directly on point. Those sections also imposed specified disabilities on a set of unions in relation to the Board's processes – in that case unions that did not comply with certain filing requirements.[3] The Court read those provisions as

[3] The specified disabilities were "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of [section 9], and no complaint shall be issued pursuant to a

follows: "The very specificity of the advantages to be gained and the express provision for the loss of these advantages imply that no consequences other than those so listed shall result from noncompliance." *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 73 (1956). The Board should read the parallel language of Section 9(b)(3) similarly to impose the specified disability – and no others - on mixed unions.

The plain meaning of the second part of Section 9(b)(3), is reinforced by the contrast between the language of the two parts. The Board has previously recognized the importance of that contrast:

> The distinction implicit in the language bears careful note. A unit containing both guard and nonguard employees is inappropriate for any purpose. Conversely, a unit composed exclusively of guard employees is appropriate. The only limitation in the latter instance is that the labor organization representing such employees cannot be 'certified' if in other aspects of its operation it admits nonguard employees to membership or is affiliated directly or indirectly with an organization which does so.

Williams J. Burns Int'l Detective Agency, Inc., 134 NLRB 451, 452 (1961).

The contrary reading of the two, distinct parts of Section 9(b)(3) in *University of Chicago* simply cannot be squared with the statutory language. The majority stated, "Section 9(b)(3) was intended to achieve a uniform result. Thus, we find no basis for distinguishing between the degree of exclusion to be applied to a mixed unit and that to be applied to a guard-nonguard union." 272 NLRB at 875-76. But the very words of the statute provide every reason for distinguishing between the two parts of Section 9(b)(3). Only by ignoring the carefully chosen

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charge made by a labor organization under subsection (b) of section 10, unless such labor organization . . . " and "No labor organization shall be eligible for certification under [section 9] as the representative of any employees, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless . . . ." *See United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 64 (1956).

and unambiguous words of the statute could the Board have concluded that the two sections were intended to achieve a uniform result and could not be distinguished.

The Supreme Court has clearly stated that a bar on certification of a union does not bar the conduct of an election involving the union and certification of the numerical results. *See NLRB v. District 50, UMW*, 355 U.S. 453, 461 (1958) ("nothing in subsection [9(b)(f), (g), (h)] is a barrier to the conduct by the Board of an election not followed by a certification").

Nor can it be argued that the prior practice permitted the equivalent of certification of a mixed union. The Board in *University of Chicago* was simply wrong when it stated that the prior practice "permits a guard-nonguard union to attain indirectly that which it cannot attain directly." 272 NLRB at 876. The prior practice did not permit a mixed union to be certified as the representative of a unit of guards. Permitting a mixed union to appear on the ballot does not necessarily and did not under prior practice result in certification of the union as the representative. Rather, under the prior practice, if the mixed union received a majority of the votes, the election resulted only in certification of the numerical results.

It simply cannot be disputed that certification of a union results in legal benefits that do not flow from certification of numerical results. Certification, as the Board has recently recognized, conveys "attendant legal advantages." *Lamons Gasket Co.*, 357 NLRB No. 72 slip op. at 4 (2011). "Such benefits include a 12-month bar to election petitions under Sec. 9(c)(3) as well as to withdrawal of recognition; protection against recognitional picketing by rival unions under Sec. 8(b)(4)(i)(C); the right to engage in certain secondary and recognitional activity under Sec. 8(b)(4)(i)(B) and 7(A); and, in certain circumstances, a defense to allegations of unlawful jurisdictional picketing under Sec. 8(b)(4)(i)(D)." *Id.* at 10 n. 35. Moreover, Congress was well aware of the specific meaning of the term "certified" when it adopted the Taft-Hartley

amendments and of the fact that certification was not the only means with which unions could obtain bargaining rights. *Id*. at 3.

If Congress had wanted to prevent mixed unions from appearing on the ballot or otherwise participating in a representation case involving a unit of guards it could easily have so provided. As the Supreme Court observed in *Arkansas Oak Flooring*, "If Congress had intended the Act to have the effect urged by the Respondents, it easily could have inserted an express provision in the statute to accomplish such result. This, Congress did not do." 351 U.S. at 72 n. 9. Congress could have provided "but no labor organization shall appear on the ballot in an election in a bargaining unit of guards if such organization admits to membership, or is affiliates directly or indirectly with an organization which admits to membership, employees other than guards." Or it could have provided "but no labor organization shall participate in any proceedings under this section involving a bargaining unit of guards if such organization admits to membership, or is affiliates directly or indirectly with an organization which admits to membership, employees other than guards." But Congress did not so provide. It simply provided that a mixed union could not be certified as the representative of a unit of guards.

In *William J. Burns Int'l Detective Agency, Inc.*, 134 NLRB 451, 453 (1961), the Board reasoned, "Congress could readily have declared a guard unit inappropriate if the representative of that unit admitted nonguards to membership or was a direct or indirect affiliate of the labor organization which did so. Congress did not so declare, and the preceding statutory language covering the 'mixed guard unit' compels the conclusion that this omission in the latter situation was deliberate." The same logic applies here.

Member Zimmerman was correct when he stated that the holding in *University of Chicago* "is premised on a flawed interpretation of the language and history of Section 9(b)(3)."

272 NLRB at 877 (Member Zimmerman, dissenting). The prior practice in no way violated Section 9(b)(3) and *University of Chicago* imposed a disability on mixed unions not authorized by Congress.

II. Section 9(b)(3) Embodies a Legislative Compromise Which Should Not be Altered by the Board.

The final version of Section 9(b)(3) represents an express compromise between the House bill, which classified guards as "supervisors," and thus outside the protection of the Act entirely, and the Senate bill, which left guards' rights under the Act fully intact. The compromise represents a deliberate, detailed, and careful balance of the interests of employers and employees that should not be altered by the Board.

The House Conference Committee Report expressly explains, "The conference agreement represents a compromise on this matter." H.R. Rep. No. 80-501 at 48 (1947) (Conf. Rep.). Senator Taft, the amendments' chief sponsor in the Senate, also made clear that Section 9(b)(3) represents a compromise between the two chambers. After the conference, he stated on the Senate floor: "We compromised with the House by providing that [guards] should have the protection of the Wagner Act, but in a separate unit. . . . That is certainly a change – although a minor one, nevertheless a reasonable one – and certainly it is a compromise with the extreme position taken by the House." 93 Cong. Rec. 6658 (1947).

Given that the precise terms of Section 9(b)(3) represent a compromise – a balance of two competing concerns – the Board is not free to go beyond the express terms of the compromise and thereby balance the competing concerns in a manner different than Congress. The Board has recognized exactly that in relation to the healthcare amendments. "[H]aving arrived at what it expressly considered a compromise, Congress did not intend for the Board to tip the balance in one direction or the other in order to better protect one set of the competing interests." *Special*

Touch Home Care Services, Inc., 357 NLRB No. 2, slip op. at 4 n.15 (2011), *rev'd*, 708 F.3d 447 (2nd Cir. 2013). As the Board observed in that case, "[i]f the balance established by Congress in the 1947 amendments is imperfect, it is up to Congress, not the Board, to adjust it." *Id.* at 5. Several courts of appeals have agreed that the Board lacks authority to disturb a compromise reached by Congress. For example, the D.C. Circuit, concluded, "[T]he Board is not free to draw the line elsewhere even in a well-intentioned belief that broader protection of the public interest in health care outweighs the resulting imposition on employees." *Laborers Local 1057 v. NLRB*, 567 F.2d 1006, 1015 (D.C. Cir. 1977).

The holding in *University of Chicago* readjusts the careful and specific balance reached by Congress through an express compromise between the chambers. It is thus improper.

III. Allowing Mixed Unions to Appear On the Ballot Does Not Compromise Employer Interests.

The clear intent of Section 9(b)(3) was to protect employers' ability to protect their property. "Section 9(b)(3) is grounded in a concern about the protection of certain property rights of an employer." *Stay Security*, 311 NLRB 252, 252 (1993). Congress protected employers' interest in this regard by preventing the Board from requiring an employer to bargain with a union in a mixed unit and by preventing the Board from certifying and thus requiring an employer, which has not voluntarily chosen to do so, to bargain with a mixed union.

But Congress did not protect employers from themselves by preventing an employer from recognizing a mixed union in a unit of guards. Congress's "concern is not undermined when the employer voluntarily waives its 9(b)(3) rights and recognizes a guard/nonguard union." *Id.* Indeed, the Board in *University of Chicago* recognized that "the purpose and intent of Section 9(b)(3)… was to . . . ensure that an employer is not *compelled* by Board action to bargain with [a

mixed union]." 272 NLRB at 875 (emphasis added). But the pre-*University of Chicago* practice in no way "compelled" an employer to bargain with a mixed union.

In fact, the decision in *University of Chicago* in no way protects employer interests. To the contrary, under *University of Chicago*, an employer that voluntarily recognizes a mixed union and establishes a stable and productive collective bargaining relationship not resulting, from the employer's own perspective, in any problems of divided loyalty may have that relationship threatened and even terminated even though both the employer and a majority of its guards desire that the relationship continue. Surely Congress did not intend such a result.

As the Board has previously noted, "permitting a [mixed union] to appear on the ballot … contribut[es] to stable labor relations by allowing employees to express fully their wishes as to a collective-bargaining agent." *Bally's Park Place*, 257 N.L.R.B. at 779. *University of Chicago*, in contrast, has the effect of "destabilizing rather than stabilizing labor relations." *The Wackenhut Corporation*, 223 N.L.R.B. 83, 84 (1976) (Members Fanning and Jenkins, dissenting). Under current procedures, "voters will be forced to choose between the Petitioner and 'no union. . . . [Removing a mixed union from] the ballot will . . . serve to destabilize the Employer's labor relations." *Id.*

Thus, *University of Chicago* does not serve and, in fact, undermines the employer interests Section 9(b(3) was intended to protect.

IV. Overturning *University of Chicago* Would Permit Employees to Exercise Core Section 7 Rights Without Compromising Congress's Purpose.

The Board must begin its analysis here from the recognition that Congress did not strip guards of Section 7 rights in 1947. The text and legislative history of Section 9(b)(3) make clear that "the Senate rejected a provision in the House bill which would have excluded plant guards as employees protected by the act. . . . Under the language of [9(b)(3)], guards still retain their

right as employees . . . but the Board is instructed not to place them in the same bargaining unit with other employees, or to certify as bargaining representatives for the guards [a mixed union]." 93 Cong. Rec. 6601 (1947) (summary of differences between Senate bill and conference agreement entered into record by Senator Taft). Thus, as the Fourth Circuit recognized, "guards are 'employees' within the meaning of [the Act] and that they retain the full panoply of rights granted to non-guard employees by section 7" except those expressly and specifically taken away in Section 9(b)(3). *NLRB v. Bel-Air Mart, Inc.*, 497 F.2d 322, 327 (4th Cir. 1974).

Having recognized that undisputed legal fact, the Board must also recognize that depriving guards of a choice on the ballot represents a serious restriction of their Section 7 rights. In *Jones & Laughlin*, the Supreme Court recognized the Board's long-held view "that freedom to choose a bargaining agent includes the right to select an agent which represents other employees in a different bargaining unit." 331 U.S. at 423. The Court also recognized that to limit guards' choice of the unions that can represent them "is to make the collective bargaining rights of the guards distinctly second-class." *Id.* at 425. Such a limit may deprive guards of any representative, it may deprive them of the most effective representative, and it may deprive them of their choice of representative. Indeed, as in this case, such a limit may deprive guards of the representative they have *already* indicated a preference for. In other words, to extend the disability imposed on mixed unions beyond that provided by Congress represents a serious incursion on guards' rights under Sections 7 and 9 of the Act.

University of Chicago's construction of Section 9(b)(3) thus creates a conflict between Sections 7 and 9 as Member Zimmerman recognized in his dissent. 272 NLRB at 878 ("[M]y colleagues have created a conflict in the two statutory provisions that did not previously, and should not now, exist."). It is a settled rule of statutory construction that such conflicts are to be

avoided to the greatest extent possible. And the prior rule did exactly that. It recognized that "Guards have the right to designate as their bargaining agent a union which the Board is proscribed from certifying." *Bally's*, 257 NLRB at 779. Courts have also recognized a "canon" of construction of "labor legislation" that is often, as here, "the result of conflict and compromise" – "a change in the status quo should not be inferred unless Congress has unmistakably indicated its wish to do so." *Laborers*, 567 F.2d at 1013. That canon was not honored in *University of Chicago*. Congress did not take away guards' Section 7 right to vote for a mixed union in 1947 and the Board is not authorized to do so.

It is no answer to say guards can simply vote no as a substitute for voting for a mixed union. Requiring guards to possess the sophistication and knowledge of Board procedures and case law needed to vote against union representation in order to retain their choice of representatives is simply unrealistic. The Supreme Court's clear rejection of voters writing in their chosen candidate's name as an alternative to choosing a name appearing on the ballot is on all fours here. The Court has clearly and repeatedly held:

> It is suggested that a write-in procedure . . . would be an adequate alternative. . . . The realities of the electoral process, however, strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot. . . . [A candidate] relegated to the write-in provision, would be forced to rest his chances solely upon those voters who would remember his name and take the affirmative step of writing it on the ballot.

Lubin v. Panish, 415 U.S. 709, 719 n. 5. *See also Anderson v. Celebrezze*, 460 U.S. 780, 799 n. 26 (1983) ("It is true, of course, that Ohio permits 'write-in' votes for independents. We have previously noted that this opportunity is not an adequate substitute for having the candidate's name appear on the printed ballot.")

Voting no when no actually means yes presents even more of a challenge to voters than having to write in the name of their chosen candidate. By omitting mixed unions that have been

representing guards after voluntary recognition from the ballot, the Board "burdens voters' freedom of association" and limits their Section 7 rights beyond what Congress provided or intended. *Id.* at 787-788.

Conclusion

For the above-stated reasons, the Board should overturn *University of* Chicago and return to its prior practice.

Respectfully submitted,

/s/ Craig Becker
Lynn K. Rhinehart
Craig Becker
Yona Rozen
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5385